

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
(NORFOLK DIVISION)

DOUGLAS SHEPHERD, ALAN G. AND :
DELORES N. BARTEL, L.P., and :
1400 HAMPTON BLVD., LLC, :

Plaintiff :

v. :

Case Number 2:10cv343

NATIONWIDE MUTUAL INSURANCE :
COMPANY :

and :

1400 HAMPTON BOULEVARD :
CONDOMINIUM ASSOCIATION, INC. :

Defendants :

NATIONWIDE MUTUAL INSURANCE :
COMPANY :

Plaintiff :

v. :

Case Number 2:10cv310

DOUGLAS SHEPHERD :

and :

ALAN G. AND :
DELORES N. BARTEL, L.P., :

and :

1400 HAMPTON BLVD., LLC, :
 :
and :
 :
1400 HAMPTON BOULEVARD :
CONDOMINIUM ASSOCIATION, INC. :
 :
 :
Defendants :

PLAINTIFF'S MEMORANDUM OF IN SUPPORT
OF MOTION TO CONSOLIDATE

Plaintiff/Defendant Nationwide Mutual Insurance Company, by counsel, states this its Memorandum in support of its Motion to Consolidate, pursuant to Rule 42 of the Federal Rules of Civil Procedure, as follows:

I. INTRODUCTION

Both of the above styled actions are for declaratory judgment brought pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. §2201 to declare the rights and other legal relations surrounding questions of actual controversy that presently exist between the Plaintiff and the Defendants.

II. STATEMENT OF FACTS AND THE CASE

Nationwide is an insurer, a corporation, organized and existing under the laws of the State of Ohio, with its principal place of business located in Columbus, Ohio. Defendant 1400 Hampton Blvd, LLC ("1400 Hampton") is a Virginia Limited Liability Company with its principal place of business located in Norfolk, Virginia. 1400 Hampton is the named insured on a contract of insurance issued by Nationwide, Policy Number 53 BP 147-036-3001 (the "Insurance Policy"). The Insurance Policy is a Business Provider Liability Coverage policy generally providing coverage for business liability for bodily injury, property damage and personal injury. The Insurance Contract

contains an endorsement for Directors and Officers Errors or Omissions Liability, commonly known as “D & O” coverage. 1400 Hampton was registered as a limited liability company on March 22, 2004, and was voluntarily cancelled by its members through a certificate of cancellation on August 19, 2005.

Defendants Douglas Shepherd (“Shepherd”) and Alan G. and Delores N. Bartel, LP (“Bartel”) are the members of 1400 Hampton. As members of 1400 Hampton, Shepherd and Bartel claim rights as the insureds under the D & O endorsement to the Insurance Contract. Shepherd is a natural person residing in the Commonwealth of Virginia. Bartel is a limited partnership created under the laws of the Commonwealth of Virginia with its principal place of business located in the Commonwealth of Virginia.

Defendant 1400 Hampton Boulevard Condominium Association, Inc. is a Corporation organized and existing under the laws of the Commonwealth of Virginia (“the Association”). The Association is the unit owners’ association of the 1400 Hampton Boulevard Condominium

1400 Hampton is the declarant of a condominium known as 1400 Hampton Boulevard Condominium (“the Condominium”) located at 1400 Hampton Boulevard, Norfolk, VA. The Condominium is a “conversion condominium” created by the conversion of an existing apartment building to condominium. On or about October 7, 2008 the Association filed a Complaint in the Circuit Court for the City of Norfolk, Virginia against 1400 Hampton, Shepherd, and Bartel (“the Underlying Action”). The Underlying Action states six separate counts seeking relief: Count I - Breach of Statutory Warranty, Count II - Breach of Express Warranty, Count III - Breach of Implied Warranty, Count IV - Negligence, Count V - Constructive Fraud, and Count VI -

Misrepresentations/Omissions in the Public Offering Statement. Nationwide is not a party to the Underlying Action.

Defendants have filed a Complaint in the Circuit Court for the City of Norfolk, styled *Douglas Shepherd, Alan G. and Delores N. Bartel, L.P., and 1400 Hampton Blvd, LLC v. Nationwide Mutual Insurance Company, et al*, Case Number 10-4212.

Nationwide has filed on July 15, 2010 a Notice of Removal of this action to the District Court for the Eastern District of Virginia, Norfolk Division, Case No. 2:10cv343.

II. ARGUMENT

A. Both Actions Seek the Same Relief, Name the Same Parties, and Involve the Same Questions of Law and Fact.

Consolidation of cases under Rule 42 of the Federal Rules of Civil Procedure is discretionary, but the Courts look at certain factors in determining whether to exercise this discretion, including the risks of prejudice and possible confusion which might result from consolidation. *Arnold v. Eastern Air Lines, Inc.*, 681 F. 2d 186 (4th Circ. 1982). Since the parties to these cases are the same, and the issues are entirely the same, no party will be prejudiced, and the Court should grant the consolidation of these cases.

WHEREFORE, Nationwide moves this Court to consolidate these two cases for hearing, trial, and for any and all matters at issue.

NATIONWIDE MUTUAL INSURANCE
COMPANY
By Counsel

/s/ Wayne F. Cyron
Wayne F. Cyron, Esquire
Va. Bar No. 12220
CYRON & MILLER
100 N. Pitt Street, Suite 200
Alexandria, Virginia 22314-3134
703-299-0600 Telephone
703-299-0603 Facsimile
wcyron@cyronmiller.com

/s/ James G. Smalley
James G. Smalley, Esq.
Va. Bar No. 20292
CYRON & MILLER
100 N. Pitt Street, Suite 200
Alexandria, Virginia 22314-3134
703-299-0600 Telephone
703-299-0603 Facsimile
jsmalley@cyronmiller.com

Counsel for Defendant Nationwide Mutual Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of July, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

Randolph C. DuVall, Esq.
Darlene P. Bradberry, Esq.
Breedon, Salb, Beasley & DuVall, P.L.C.
555 East Main Street
Suite 1210
Norfolk, VA 23510
Counsel for Defendants

/s/ James G. Smalley

James G. Smalley, Esquire

Va. Bar No. 20292

CYRON & MILLER

100 N. Pitt Street, Suite 200

Alexandria, Virginia 22314-3134

703-299-0600 Telephone

703-299-0603 Facsimile

jsmalley@cyronmiller.com